

Gary M. Hoffman (*Pro Hac Vice*)  
Kenneth W. Brothers (*Pro Hac Vice*)  
**DICKSTEIN SHAPIRO MORIN**  
**& OSHINSKY, LLP**  
2101 L Street, NW  
Washington, DC 20037-1526  
Phone (202) 785-9700  
Fax (202) 887-0689

Edward A. Meilman (*Pro Hac Vice*)  
DICKSTEIN SHAPIRO MORIN  
& OSHINSKY, LLP  
1177 Avenue of the Americas  
New York, New York 10036-2714  
Phone (212) 835-1400  
Fax (212) 997-9880

Jeffrey B. Demain, State Bar No. 126715  
Jonathan Weissglass, State Bar No. 185008  
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN  
177 Post Street, Suite 300  
San Francisco, California 94108  
Phone (415) 421-7151  
Fax (415) 362-8064

Attorneys for Ricoh Company, Ltd.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SYNOPSYS, INC.,  
Plaintiff,  
vs.  
RICOH COMPANY, LTD.,  
Defendant.

) CASE NO. C-03-2289-MJJ  
) RICOH'S REPLY IN SUPPORT OF ITS  
) MOTION FOR APPROVAL OF  
) PROTECTIVE ORDER, AND OPPOSITIONS  
) TO SYNOPSYS' CROSS-MOTION FOR  
) APPROVAL OF SYNOPSYS' PROPOSED  
) PROTECTIVE ORDER  
) Date: February 10, 2004  
) Time: 9:30 a.m.  
) Courtroom: 11

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1           **I. INTRODUCTION**

2       Ricoh would gladly accept this Court's endorsement of the protective order that was negotiated  
3 by counsel for all parties before the related action was transferred to this Court from Delaware, and  
4 entered by Delaware District Court Judge Sleet. After having its counsel negotiate that protective order  
5 as the representatives of the defendants in that case, however, Synopsys wants to reject it and instead  
6 urge this Court to impose extraordinary limits on the ability of Ricoh and its experts to review the  
7 software that Synopsys itself deliberately and intentionally placed at issue in its declaratory judgment  
8 action. Synopsys' proposal would place an inappropriate burden upon the ability of Ricoh's experts and  
9 attorneys to evaluate, test, and report on the operation of the relevant software code, and of necessity,  
10 invades the work product privilege. Synopsys' proposal subjects each evaluation session to oversight by  
11 Synopsys. It limits the time that the work may be done and places Ricoh's attorneys review under  
12 Synopsys' control.

13       By contrast, Ricoh's proposal balances the interests of the parties by placing the software solely  
14 within the control of Ricoh's counsel, within a secure facility, in a locked, restricted access room, and on  
15 a non-networked computer. The procedures proposed by Ricoh are the same that Ricoh's counsel  
16 utilizes in litigation for the protection of highly confidential materials produced in government contract  
17 litigation with the United States Government. Although Synopsys claims that this level of protection is  
18 inadequate, this is belied by the fact that Synopsys has not insisted on any similar protections on the  
19 hard copy sections of the code that it will produce! The fact that Synopsys will produce the source code  
20 in hard copy without these extraordinary restrictions, but insists on preventing Ricoh's attorneys and  
21 experts from accessing the source code in electronic form (in which it can be tested) except in a  
22 Synopsys facility, reflects an inconsistent approach to its purported security concerns. Clearly,  
23 Synopsys is not adverse to producing the source code, but only seeks to erect obstacles to an effective  
24 examination of what it is prepared to produce.

25       The legitimacy of Synopsys' concern in its cross-motion is further suspect due to a second  
26 position taken by Synopsys. Counsel for the parties had previously expressly agreed that three experts  
27  
28

1 from each party would have access to the source code.<sup>1</sup> Without acknowledging the fact, however,  
 2 Synopsys' proposed protective order secretly and unilaterally dropped that number of Ricoh experts  
 3 having access from three to one. This reduction would cause a tremendous prejudice to Ricoh.  
 4 Synopsys' sleight of hand raises a question as to the veracity of the other statements in Synopsys'  
 5 opposition, especially after Synopsys secretly persuaded Dr. Thomas to switch sides.<sup>2</sup>

6 In light of the Court's Order of January 21, 2004 (since withdrawn), a revised Ricoh proposed  
 7 protective order is submitted herewith. In paragraphs 14 and 26, it incorporates the detailed instructions  
 8 and time limit that the Court set forth in that Order. No other changes have been made.

## 9           **II. FACTS**

10       The present Declaratory Judgment action is related to a patent infringement action (the  
 11 "Delaware case") filed by Ricoh against a group of ASIC manufacturers in Delaware (which has been  
 12 subsequently transferred to this Court and is pending as docket number C03-4669 MJJ). While a  
 13 Protective Order had been agreed to and entered by the Delaware Court, Synopsys now seeks to change  
 14 that Protective Order. In a spirit of compromise, Ricoh has worked with Synopsys and resolved all  
 15 issues with the exception of one (although, Synopsys has now slipped in a second issue as indicated  
 16 above).

### 17           **1. The Parties' Differences Regarding the Location of the Source Code**

18       Other than the new issue of the number of experts, the parties had negotiated all but one  
 19 provision of the protective order in this case. The only unresolved issue is the definition of a secure  
 20 facility to be used for secure storage of the electronic version (but not the print version) of the source  
 21 code to permit the unfettered and unobserved examination and testing of alleged infringing software and  
 22 any other source code.

23       Under Ricoh's proposal for its protective order, Synopsys would provide and Ricoh would  
 24 maintain the electronic version of the source code in a secure facility. Ricoh has proposed a secure  
 25

26  
 27       <sup>1</sup> Ricoh originally had not wanted any restriction on the number of experts but in reaching a compromise  
      with Synopsys had agreed to be limited to three experts being able to view the software.

28       <sup>2</sup> See Ricoh's pending motion for sanctions.

1 facility as a location within the confines of the Washington, DC office of Dickstein Shapiro Morin &  
 2 Oshinsky, LLP, Ricoh's attorneys of record. Ricoh's proposed facility would comprise a non-networked  
 3 computer in a locked room within the law office. (DSMO letter 11/20/03, Ex. 1). The law firm, in  
 4 addition to providing control over its offices in general, would additionally control access to the room  
 5 and access to the source code. This approach allows Ricoh's counsel and experts (under the protective  
 6 order) unfettered, unhindered, and unobserved access to the software while still safeguarding and  
 7 maintaining the confidentiality of the source code.

8 There is some significance to the fact that the Dickstein Shapiro firm is well versed in  
 9 maintaining confidential documents and software. Dickstein Shapiro uses the same type of software and  
 10 access protections as outlined in the Synopsys declarations. Dickstein Shapiro in its offices has obtained  
 11 and kept restricted access to secret governmental documents and/or software in various litigations  
 12 involving government contracts or other issues. Dickstein Shapiro also has obtained and kept restricted  
 13 access in its offices to secret or otherwise confidential documents and/or software in a large number of  
 14 private litigations. Contrary to the implications being raised by Synopsys, no source code has ever been  
 15 misappropriated from a Dickstein Shapiro facility. (Weinstein Decl.)

16 Under Synopsys' proposal, Synopsys would make available and maintain Synopsys source code  
 17 in a secure facility defined as Synopsys' SURF, a Synopsys facility that is under the authority and  
 18 control of Synopsys in Mountainview, California or another "SURF-like" Synopsys facility in Bethesda,  
 19 Maryland. (Howrey letter 12/7/03, Ex. 2). This proposal is unworkable because it significantly affects  
 20 and limits Ricoh's counsel and experts unfettered, unhindered, and unobserved access to the software.  
 21 Although one Synopsys' facility may be open 24/7 and the other facility in Bethesda is open during  
 22 business hours, both facilities observe, monitor, and selectively authorize persons visiting the Synopsys  
 23 facility. Attaining hard-copy printouts while at the facility is subject to the scrutiny (and permission) of  
 24 Synopsys. Therefore, any print-outs of tests of Synopsys software that are conducted will be  
 25 immediately known and seen by Synopsys.<sup>3</sup> Synopsys will also be cognizant of which sections of  
 26  
 27

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28 <sup>3</sup> While Synopsys is correct that eventually Ricoh must identify all materials relied upon by its experts,  
 this identification takes place when the expert reports are provided and not throughout the litigation

1 Synopsys software is being printed out because it is the only one who can do the printing. As the  
 2 Synopsys program is presumed to be large, examination of the code will take a significant amount of  
 3 time. Examination of the software may require additional software tools to help experts identify the  
 4 functionality and inter-operability of the software. As indicated in Van Nguyen's affidavit, Synopsys  
 5 uses monitoring software, Clearcase, to observe, control, and track access to Synopsys software. (See  
 6 Nguyen Affidavit, Ex.3). This, and/or similar types of control mechanisms, will provide and enable  
 7 Synopsys the awareness of Ricoh's counsel's and experts' activities during their examination of the  
 8 Synopsys code. Synopsys' actions not only prevent Ricoh's counsel and experts unfettered, unhindered,  
 9 and unobserved access to the software, but their actions also would clearly invade the attorney work  
 10 product privilege.

11           **2.     Synopsys' Undisclosed Change to the Number of Experts**

12       Synopsys has changed its position on the number of experts that would be permitted access to the  
 13 software. The parties had previously agreed that three (3) experts would be allowed to access the code.  
 14 (See Weinstein Decl.). Without ever mentioning the issue in its brief, Synopsys' proposed protective  
 15 order, however, permits only one expert to access to the software. But for a close comparison of the  
 16 Ricoh's and Synopsys' proposed protective orders, this change would not have been spotted.<sup>4</sup>

17           **III.    ARGUMENT**

18           **ADOPTION OF RICOH'S PROVISION REGARDING THE PROTECTION OF SOURCE  
 19           CODE IS WARRANTED.**

20           **1.     Confidential material should be protected**

21       No one disputes that confidential material should be protected. Cases cited by Synopsys confirm  
 22 that courts are inclined to grant protective orders to protect a party's confidential material. The only  
 23 disagreement here is one aspect of how the confidential material should be protected.

24       In the instant case, Synopsys intentionally placed its software at issue. Synopsys contends that it

26       every time Ricoh's counsel looks at or copies a document. Synopsys should have no right to look over  
 27 the shoulder of counsel for Ricoh and watch them work.

28       <sup>4</sup> Giving Synopsys the benefit of the doubt, it is conceivable that this could have simply been a  
 stenographical error.

1 filed the declaratory judgment case since it ‘arises from’ Ricoh’s patent infringement suit on the ‘432  
2 patent against certain manufacturers of ASICs (the ASIC defendants) and the Synopsys source code  
3 involved is the same in both actions. In both actions, one issue relates to the use of the Synopsys  
4 software as part of a manufacturing process that infringes U.S. Patent number, 4,932,432. Therefore,  
5 not only is the Synopsys software, in both its executable and source code form, relevant to the instant  
6 case, but it is also relevant to the determination of infringement. The source code is needed in order to  
7 be able to view the code and understand how the program is structured. The executable code is  
8 important because it is needed to test how the program works. Synopsys does not dispute the relevance  
9 of the source code.

10 The parties agree that the Synopsys Design Compiler source code is confidential and should be  
11 protected. However, the protected confidential material still needs to be subject to restrictions which are  
12 reasonable.

13 Where software source code has been found to be both relevant and necessary in a case, the court  
14 must balance one party’s need for information with the other party’s interest in maintaining the  
15 confidentiality of the source code. In this case, there is a need for information that comes from access to  
16 the electronic version of the source code (and a hard copy of portion may be needed for further detailed  
17 review).<sup>5</sup> It is relevant and necessary to access the Synopsys source code to determine the functionality  
18 of the program. An appropriate protective order can satisfy both parties, *Hartman v. Remington Arms*,  
19 143 F.R.D. 673 (W.D. Mi 1992). By offering to allow representatives of Ricoh to have access to the  
20 code under a protective order, Synopsys concedes that its concerns about confidentiality are not  
21 necessarily directed towards Ricoh (or its representatives). Synopsys’ real concerns are about third  
22 parties getting access to the software.

23 **2. Synopsys’ source code is relevant and must be disclosed**

24 Synopsys overlooks its responsibility under the Patent Local Rules. Patent L.R. 3-4 “Document  
25 production Accompanying Preliminary Invalidity Contentions” establishes several different types of  
26 documents that must be produced as part of a patent suit. The Rule recognizes and specifically  
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28 <sup>5</sup> Synopsys has not insisted that the hard copies be kept under the same “lock and key” security.

1 enunciates that source code is to be produced. (Patent L. R. 3-4) Synopsys is intentionally trying to  
 2 remove itself from, or avoid, the requirements under the Rules. Even the model stipulated protective  
 3 order provided by the Court does not unduly restrict access to confidential source code. The model does  
 4 not expressly or impliedly treat confidential source code any different from any other type of  
 5 confidential material.

6 Synopsys asserts that with respect to security, its facilities are beyond approach. But, regardless  
 7 of how sophisticated, affluent, or large Synopsys' security system is, it does not negate the security of a  
 8 locked facility within Dickstein Shapiro. Synopsys, in its opposition motion, spent a great deal of time  
 9 to suggest the extreme measures it takes to safeguard its code. According to the statement of Nguyen,  
 10 Synopsys spends one-fifth of its operating costs on security. (See Nguyen Decl., Ex. 3) Synopsys also  
 11 employs many physical and technical measures to safeguard code. But, however much Synopsys may  
 12 toot its own horn about how good its facilities are or how much money its spends on security, that does  
 13 not correlate with the proposition that protection is not available from the law offices of Ricoh's  
 14 counsel. Synopsys simply offers its conclusion that a locked facility within Dickstein Shapiro is not  
 15 safe. Synopsys fails to indicate why that it is in fact not safe. Dickstein Shapiro does not simply offer a  
 16 locked door in a building—its offices as a whole are under a security system controlled by Dickstein  
 17 Shapiro, not the building. The locked office is a secured room within a secured facility (offices). The  
 18 computer can be password protected to add yet another layer of security. Although the Dickstein  
 19 Shapiro office facility is not under Synopsys' control, that does not mean that the facility offered by  
 20 Dickstein Shapiro is not secure. Additionally, the protection for the hard copy printout that Synopsys  
 21 proposes would be subject to much less security.<sup>6</sup> Synopsys has not proffered an objection to a print  
 22 version of its source code sitting on an attorney's desk, out in the open, in the very same offices in which  
 23 the locked room is located.

24 Synopsys simply wants to maintain exclusive control of the access to its electronic source code  
 25 and the inspection by Ricoh's counsel and experts. By maintaining supervision and oversight of the  
 26

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27 6 As admitted by Synopsys, "with the advent of bulk scanning and optical character recognition, it is not  
 28 impossible to convert paper copies of source code back into an electronic format." (See Opposition  
 Motion, page 7, footnote 2)

1 facility that is suggested by Synopsys (the SURF facility it owns and controls), Synopsys desires to  
2 pierce the work product privilege. By regulating who can access the code and when they access the  
3 code, Synopsys, at the very least, is trying to invade Ricoh's work product privilege. Synopsys'  
4 approach to providing access to the software does not provide Ricoh's counsel or experts unfettered,  
5 unobserved access to the code. For example, Synopsys' motion describes the layers of access restriction  
6 that exists that must be navigated for a person just to gain entry to the Synopsys facility. Further,  
7 Ricoh's access is further restricted in that Synopsys will only provide printouts after Ricoh's  
8 identification of the desired sections. Again, this approach does not allow an expert to investigate the  
9 software code without oversight as this approach does not allow "unfettered access" to the code, but only  
10 access to portions selected under the watchful eye of Synopsys.

11 Presumably, the Synopsys source code is rather lengthy. Therefore, an expert's analysis of the  
12 code may require a significant amount of time to study and understand the program flow and operational  
13 elements. Lengthy code is often more easily analyzed using a computer rather than examining the code  
14 solely on paper. Additionally, software analysis tools may be required as part of the analysis process.  
15 Synopsys asserts that in its brief that it is against the Ricoh protective order because it 'would require  
16 Synopsys to "surrender control over a complete copy of the source code for its most important product  
17 to Ricoh, an adverse party." Synopsys is wrong. Nowhere does Ricoh's protective order provide or  
18 allow for the source code to be accessed by other than certain individuals. Under Ricoh's proposal,  
19 Synopsys gets more protection than provided by the prototype protective order promulgated by this  
20 Court. Synopsys' source code would be on a single, stand-alone (non-networked) computer in a locked  
21 room located in the offices of Ricoh's counsel and access to the room would be under the control of a  
22 Ricoh attorney. The Ricoh proposal also ensures the protection of Ricoh's privileged attorney work  
23 product.

24 Traditional discovery procedure does not allow Synopsys to choose what sections of the code to  
25 provide. Synopsys cannot selectively choose what sections of the code it believes are relevant and only  
26 produce those sections—Synopsys must make the entire program available. Ricoh's counsel and experts  
27 must be able to determine what code sections they feel are relevant to the allegations. Synopsys should  
28 not "in any event" know what sections of code that Ricoh would like made available for its review. Nor

1 is it reasonable to expect Ricoh to have to approach Synopsys each time it desires a printout and then  
2 wait “a reasonable time” (whatever that means) for it to be produced.<sup>7</sup>

3 Ricoh’s proposal is not only based on a reasonable approach for effectuating a reasonable  
4 examination of the Synopsys program, but it also addresses legitimate concerns. Contemporaneously  
5 pending with this motion is Ricoh’s motion for sanctions. Ricoh’s other motion addresses the  
6 impropriety of Synopsys’ actions demonstrated in the early days of the related case—the transferred  
7 case. That motion, in short, regards Synopsys’ counsel aggressively seeking information and advice  
8 from an expert while knowing the expert had previously been retained by Ricoh. Therefore, Ricoh’s  
9 concerns are not “fantastic speculation” and are not simply based on the adversarial nature of litigation,  
10 but also derived from the prior actions of Synopsys.

11 Furthermore, the content of the protective order in the related case is relevant. Even if Synopsys  
12 desires that an infringement determination and therefore the examination of the source code be  
13 addressed in this action, that does not preclude the reality that the ultimate determination of infringement  
14 by the Delaware defendants will occur in the *Ricoh v. Aeroflex et al.* case. Further, Synopsys is  
15 intimately involved in both cases, in the instant case as the plaintiff and in the ASIC defendant case  
16 where Synopsys controls the actions of the ASIC Defendants and Synopsys has been subpoenaed as a  
17 third party. Neither Synopsys nor Ricoh “won” this issue; the issue was deferred due to the transfer of  
18 the Delaware case to California. Synopsys still has an obligation to provide source code in the  
19 transferred case.

20 The content of the protective order in the related case is also relevant because it was a common  
21 ground for agreement between the parties. As seen in the letter of November 7, 2003, Synopsys’  
22 counsel agreed to use of the Delaware case Protective Order as long as it was amended to include and  
23 address its concerns about the production of Synopsys source code. (See Ex. 2, letter Nov. 7, 2003).  
24 Therefore, both sides agreed to use of the Delaware case Protective Order, but could not completely  
25 agree as to source code provision.

26  
27 <sup>7</sup> This process of waiting for (approval and production of) printouts could conceivably unnecessarily  
28 delay and frustrate Ricoh’s discovery in these actions, all playing into Synopsys’ threat to make the  
litigation long and expensive.

Even the case law cited in Synopsys' brief makes clear that source code will be disclosed. In *Dynamic Microprocessor v. EKD*, 919 F.Supp 101 (E.D.N.Y. 1996) source code was the subject matter of the dispute. Even though the source code was found to be a trade secret, the court ordered the production of the source code in dispute under the guidelines of the protective order in the case.<sup>8</sup> In another case to which Synopsys refers, the court ordered the production of the source code in dispute. In *Adobe Systems v. Macromedia*, 2001 U.S. Dist. LEXIS 18630 the Court ordered that printed copies be provided instead of production by encrypted code. The court did not otherwise restrict or limit the production to less than the entirety of the code.

Additionally, contrary to Synopsys' interpretation of the local rules, Ricoh does not have an obligation to produce any document or other information pursuant to Patent L.R. 3-1 – this case is declaratory judgment action where there are no pending claims of infringement filed by Ricoh. (See Patent L. R. 3-5.) Ricoh will identify the sections of code it is relying after receiving and examining the entirety of the Synopsys program at the appropriate time during discovery.<sup>9</sup>

### **3. At least three experts should be allowed access to source code**

The parties had previously agreed on three experts having access to the other party's confidential source code and confidential documents. Although Ricoh initially preferred five (5) experts and Synopsys preferred only one (1), the parties reached a compromise and agreed on the use of three (3) experts. (See Weinstein Decl.). Three experts were determined to be a fair balance in light of the size of the program and the differing roles of the experts. Synopsys Design compiler is presumed to be a relatively large program. The analysis of the code may require team work to perform effectively and within a reasonable time. Different experts may be utilized by Ricoh, e.g., at least one that may be a testifying expert, another expert may serve as a consulting expert, and a third expert may be used to help expedite the analysis.

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<sup>8</sup> Note that the court placed no restrictions on the amount of source code to be produced, i.e., no partial production of the code. "The Source codes shall be produced" (*Dynamic*, at 11).

<sup>9</sup> As this is a Declaratory Judgment action without any claims for infringement, Ricoh is under no obligation to provide an infringement analysis. (See Patent L. R. 3-5 which obviates the requirement to produce infringement analysis under Patent L.R. 3-1)

1                                  **IV. CONCLUSION**

2                                  Ricoh respectfully requests that this Court adopt its proposed protective order, which  
 3 incorporates Ricoh's provision for the protection of source code so that it can have fair access to the  
 4 software without invading the attorney work product privilege. Ricoh also seeks approval of the  
 5 provision allowing for three experts to access the Synopsys code.

6                                  Dated: January 27, 2004

Respectfully submitted,

Ricoh Company, Ltd.

9                                  By: \_\_\_\_\_ Ken Brothers

10                                 Jeffrey B. Demain, State Bar No. 126715  
 11                                 Jonathan Weissglass, State Bar No. 185008  
 12                                 ALTSHULER, BERZON, NUSSBAUM,  
 13                                 RUBIN & DEMAIN  
 14                                 177 Post Street, Suite 300  
 15                                 San Francisco, California 94108  
 16                                 Phone: (415) 421-7151  
 17                                 Fax: (415) 362-8064

18                                 Gary M. Hoffman  
 19                                 Ken Brothers  
 20                                 Eric Oliver  
 21                                 DICKSTEIN SHAPIRO MORIN &  
 22                                 OSHINSKY LLP  
 23                                 2101 L Street NW  
 24                                 Washington, D.C. 20037-1526  
 25                                 Telephone: (202) 785-9700  
 26                                 Facsimile: (202) 887-0689

27                                 Edward A. Meilman  
 28                                 DICKSTEIN SHAPIRO MORIN &  
 29                                 OSHINSKY LLP  
 30                                 1177 Avenue of the Americas  
 31                                 New York, New York 10036  
 32                                 Telephone: (212) 896-5471  
 33                                 Facsimile: (212) 997-9880

34                                 Attorneys for Ricoh Company, Ltd.